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March 15, 2023 *VIA ECF*

The Honorable Sarah Netburn United States District Court, SDNY 40 Foley Square, Room 219 New York, New York 10007

Re: Nike, Inc. v. StockX LLC, Case No. 1:22-cv-00983-VEC (S.D.N.Y.)

Dear Judge Netburn:

Nike, Inc. ("Nike") respectfully submits this letter motion pursuant to Your Honor's Individual Practices II.C. to compel StockX's LLC ("StockX") to produce highly relevant documents and testimony that it is withholding based on improper objections. The parties have exchanged rounds of written correspondence and met and conferred by telephone on March 14, 2023.

I. StockX Must Produce Documents Related to Counterfeits Sold to

As the Court may recall, between March and July 2022, StockX "authenticated" and so	old at least
38 pairs of counterfeit "Nike" shoes to a consumer named, who is a sneake	<u>r c</u> ollector
and reseller. After receiving these shoes,	. Nike
and visited on July 22, 2022 to inspect the "Nike" shoes that	bought on
StockX's platform. Nike confirmed that at least 38 pairs of "Nike" shoes	bought on
StockX's platform are counterfeit. Nike did not take possession of these shoes and	1
ultimately returned the shoes to StockX for a full refund.	

Before Nike's inspection, StockX's then Senior Director of Account Management, Russ Amidon,

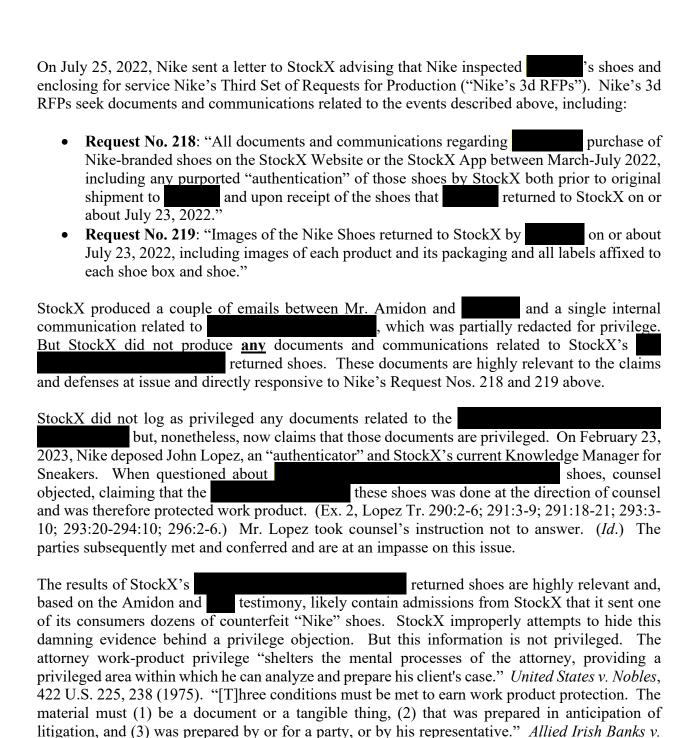
Mr. Amidon

[Ex. 4.] At his November 30, 2022 deposition, Mr. Amidon returned shoes,

(Ex. 1, Amidon Tr. 89:14-90:21.)

[Ex. 3, Tr. 90:10-19.]

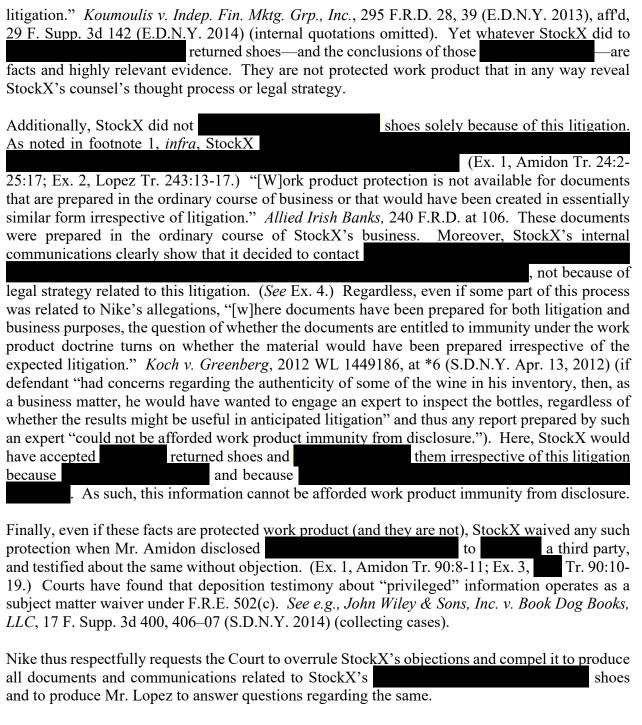
¹ While StockX does not accept returns,



StockX's retuned shoes is not protected work product "opinion," as StockX claims. (Ex. 2, Lopez. Tr. 293:23.) "To be entitled to protection for opinion work product, the party asserting the privilege must show a real, rather than speculative, concern that the work product will reveal counsel's thought processes in relation to pending or anticipated

Bank of Am., N.A., 240 F.R.D. 96, 105 (S.D.N.Y. 2007) (internal quotations omitted). To be eligible for work product protection, "the materials must result from the conduct of investigative or analytical tasks to aid counsel in preparing for litigation." Wultz v. Bank of China Ltd., 304

F.R.D. 384, 394 (S.D.N.Y. 2015) (internal quotations omitted).



II. StockX's Deficient Production of Documents Responsive to Nike's Fifth Set of Requests ("Nike's 5th RFPs")

StockX asserts acquiescence and estoppel defenses, alleging that "Nike has collaborated with StockX on authentication efforts, sent Nike representatives to one of StockX's authentication centers in or around October 2018 and again in 2019, and has worked with StockX to combat counterfeiting." (Dkt. 41 at 38, ¶ 8). StockX claims that it "has detrimentally relied on Nike's

praise and approval of StockX's authentication and anti-counterfeiting efforts," (Dkt. 41 at 39, ¶ 12) and that "Nike's perceived support" of its authentication efforts "and related delay in asserting any counterfeit claims has caused StockX undue prejudice." (*Id.* at 40, ¶ 17). StockX also served requests on Nike for the parties' prior communications related to counterfeiting.

Considering these allegations and requests, Nike's 5th RFPs seek, *inter alia*, communications regarding StockX's actual or potential collaborations with Nike, including:

- Request No. 240: "All Communications between You and Nike about efforts to prevent the sale of counterfeit goods or remove listings for counterfeit goods, and all internal Documents and Communications concerning such Communications with Nike."
- Request No. 241: "All Documents and Communications reflecting Your knowledge that You do not have the capability to authenticate Nike goods in the same manner as Nike."
- Request No. 242: "All Documents and Communications Concerning Your actual or potential collaborations or other business relationships with Nike, including any actual or potential collaborations regarding brand protection or authentication of Nike goods."
- Request No. 243: "All Documents and Communications Concerning Your actual or potential collaborations or other business relationships with Nike, including any actual or potential collaborations regarding brand protection or authentication of Nike goods."

StockX's objections and responses to these Requests improperly narrowed the relevant time period of StockX's search for responsive documents from July 1, 2020 to May 25, 2022, despite the fact that StockX required Nike to search back to January 1, 2017 for reciprocal information, which it did.² The parties met and conferred via telephone on December 16, 2022 regarding the appropriate time period, which Nike stated should cover January 1, 2017 onward just as StockX had demanded.

StockX has not rejected Nike's position outright, but rather contends that its production of documents responsive to Nike's Requests is complete. This contention is troubling to Nike. Nike is aware of the StockX's requests that have not been produced by StockX to date. Nike is thus not relying on "mere speculation that [t]here ha[s] to be more records" but rather "concrete evidence" that additional documents indeed exist. *In re Terrorist Attacks on Sept. 11, 2001*, 2018 WL 4062638, at *2 (S.D.N.Y. Aug. 27, 2018) (Netburn, M.J.). Further, "actual or potential collaborations regarding brand protection or authentication of Nike goods," sought by Request No. 243 has been produced.

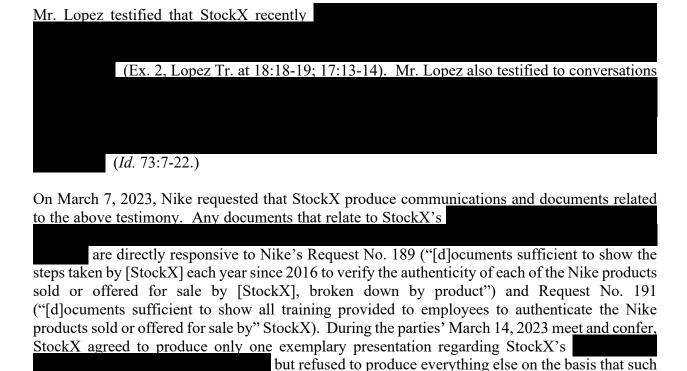
more internal communications <u>must</u> exist. Yet StockX has not proffered any explanation of these gaps in its production. Nike has received other documents from StockX from 2017, so it appears that StockX's systems retain documents dating back to at least that year.

For these reasons, Nike respectfully asks that the Court compel StockX to conduct a more thorough search and produce additional documents responsive to Nike's Fifth Set of Requests dating back to January 1, 2017, or, at the least, explain in detail why those documents cannot be located.

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² The Court already found documents of this nature and during this period to be relevant when ordering Nike to produce similar documents from 2017 onward. (*See* Dec. 30 Hr'g Tr. at 35:15-17 ("StockX is entitled to Nike's evaluation in real time as it had accessed the information to StockX's authentication and anticounterfeiting efforts.").

III. StockX's Improper Refusal to Search for and Produce Relevant and Responsive Documents Regarding its "Authentication" of Nike Shoes



This position is wrong. "A party who... has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response in a timely manner if the party learns that in some material respect the...response is incomplete or incorrect." Fed. R. Civ. P. 26 (e)(1)(A). StockX cannot refuse to produce responsive, relevant documents on the basis that they were created *after* Nike filed the Amended Complaint. Nike has identified a clear gap in StockX's production of responsive document and StockX is under a duty to supplement its document production and rectify this omission. For these reasons, Nike respectfully asks that the Court compel StockX to produce documents related to use of

documents relate to events that occurred after Nike filed its amended complaint.

Nike thanks the Court for its consideration of this matter.

Respectfully submitted,

Tamar Y. Duvdevani

Counsel for Plaintiff Nike, Inc.

cc: Counsel of Record via ECF